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86-1577

Supreme Court, U.S.
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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1986

FERNANDO FERNANDEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

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QUESTION PRESENTED

WHETHER THE DEFENDANT PARTICIPATED IN THE AFFAIRS OF THE ENTERPRISE THROUGH A "PATTERN OF RACKETEERING ACTIVITY" IF THE SINGLE RECORDED CONVERSATION BETWEEN THE DEFENDANT AND THE MAIN TARGET OF THE INVESTIGATION, CHEO FERNANDEZ, CONCERNING THE ALLEGED AGREEMENT TO KIDNAP AND MURDER ONE "ROGELIO," WAS NOT AN ACT SUFFICIENT TO SHOW CONTINUITY PLUS RELATIONSHIP SUFFICIENT TO CONSTITUTE A "PATTERN".

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Petition for a Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

The Petitioner, FERNANDO FERNANDEZ, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceeding on August 26, 1986.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at *United States v. Fernando Fernandez*, 797 F.2d 943 (11th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on August 26, 1986. A timely petition for rehearing was filed on September 12, 1986, and was denied on January 8, 1987. The petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

STATEMENT OF THE CASE

The FBI began investigating the activities of Cheo Fernandez, a suspected drug smuggler, back in January of 1983 (R.22:38–39). They based their investigation upon information provided to them by government informant Moises Perez (R.23:5–6). Perez began working for Cheo Fernandez in September of 1982, first as a repairman for some of Cheo Fernandez's ships in the Grand Cayman Islands (R.23:7–8, 14–17), and then as a captain and navigator of several boats involved in smuggling and transporting marijuana from Colombia to the United States (R.23:17–20, 27–42). Perez began meeting with the FBI in January of 1983, providing them with information regarding these drug smuggling activities, and the FBI began intercepting marine radio

communications between the "Onasis" and the "Cayman" (R.22:41–48). The FBI set up surveillance of Cheo Fernandez and others involved in his organization (R.23:53–73, 86; 24:41–58, 69–70; 25:3–6, 10–11, 12–16). The FBI also set up an audio and video surveillance at Cheo Fernandez's office at the Allay Shopping Center located at 7155 W. Flagler Street in Miami, Florida (R.22:64, 112–19; 25:3–4). Nearly 1,687 conversations were intercepted at Cheo's office, of which 425 were incriminating (App.Br. 26). The Petitioner was seen entering the office of Cheo Fernandez on only one occasion and was only identified in a portion of one of those conversations on November 5, 1983, one year and two months after the investigation had commenced and only two weeks prior to the time a warrant for the arrest of Cheo Fernandez and others involved in his organization was issued (R.22:65–67; 24:46, 24–25). On December 14, 1983, a warrant was issued for the Petitioner's arrest and he voluntarily surrendered (R.21:98–99).

The Petitioner was never seen entering or leaving the office of Cheo Fernandez either prior to or after November 5, 1983 (R.22:110–12). Photographs were taken of Cheo Fernandez and his associates at the Allay Shopping Center throughout the course of the investigation and the Petitioner was not in any of these photographs (R.23:86–87). The Petitioner was not heard in any of the intercepted conversations at the office of Cheo Fernandez either before or after November 5, 1983 (R.22:110–12). Furthermore, Cheo Fernandez's most trusted and valuable employee, government informant Moises Perez, made no mention whatsoever of the Petitioner throughout his entire trial testimony

(R.23:4–53). Other than that one portion of a single recorded conversation late in the investigation of Cheo Fernandez and his associates, there was absolutely no testimony or evidence presented at trial that the Petitioner had any dealings whatsoever with Cheo Fernandez. If Cheo Fernandez and the Petitioner had any ongoing criminal relationship, such information certainly would have been discoverable through any one of the several FBI agents' testifying about their undercover surveillance of Cheo Fernandez's activities (R.22:38–112, 113–19; 23:65–93; 24:4–7, 24–25; 24:41–58, 69–70; 25:3–16; 27:5–42).

Government's Exhibit 105-Tr-B was the portion of the recorded conversation between the Petitioner and Cheo Fernandez recorded on November 5, 1983 (R.27:12–14). The tape was introduced into evidence at trial (R.27:22–24). The appellate court found that based upon this conversation, the government successfully showed that the Petitioner was involved in a "pattern of racketeering activity" because the conspiracies to kidnap and murder the same person demonstrated two predicate crimes sufficient to form the requisite pattern of racketeering activity. The pertinent portions of Exhibit 105-Tr-B indicated the following: the Petitioner and Cheo Fernandez discussed the Petitioner's work for Metrorail (Exhibit 105-Tr-B, pp. 13–14) and the Petitioner told Cheo Fernandez that he knew a pilot, although he did not know anything about a DC–3 or a DC–6 (Exhibit 105-Tr-B, pp. 26–28). Then the discussion turned to someone named "Rogelio" (Exhibit 105-Tr-B, p. 36). The Petitioner said that they were mad at "Rogelio" because he was the one who stole from "el negro de la Havana", Maria Teresa and Miguel, "el

flaco" (Exhibit 105-Tr-B, p. 36). The Petitioner wanted "Rogelio" to confess and give the money back. Cheo Fernandez said that he has "to die" (Exhibit 105-Tr-B, p. 37). The Petitioner said, "Yes." Later they both said that he had to be "hit" and then set fire (Exhibit 105-Tr-B, p. 38, 39). That was the extent of the discussion between the Petitioner and Cheo Fernandez regarding Rogelio. There was no evidence that this discussion was in any way related to the affairs of the enterprise or that it was a predicate crime, and there was no actual agreement that these crimes would be committed. Nothing was ever done in furtherance of this isolated discussion (R.29:64).

The Petitioner was charged in 4 counts of a 20-count indictment (R.1:1-38). Count 1 of the Indictment charged the Petitioner with a RICO conspiracy and the acts of racketeering that the Petitioner was alleged to have committed included the following: 1) that the Petitioner conspired to import and possess with the intent to distribute marijuana as specified in Counts 4 and 5 of the Indictment; 2) that the Petitioner conspired to murder an individual called "Prieto"; 3) that the Petitioner conspired with Cheo Fernandez to kidnap "Rogelio"; and 4) the Petitioner and Cheo Fernandez conspired to kill "Rogelio". Count 2 of the Indictment was a substantive RICO count and adopted the allegations in Count 1. Count 4 of the Indictment charged the Petitioner with conspiring to import marijuana from September 1, 1982 until November 20, 1982. Finally, Count 5 of the Indictment charged the Petitioner with conspiring to possess with the intent to distribute marijuana between September 1, 1982 and November 20, 1983. At trial, during the Petitioner's

motion for a judgment of aquittal at the end of the government's case, the government admitted that it did not have sufficient evidence to prove the predicate act of conspiring to murder an individual named "Prieto" (R.29:113). The court agreed and dismissed any charges relating to the alleged conspiracy to murder "Prieto" (R.29:115). The trial court otherwise denied the Petitioner's motion for acquittal and returned a verdict of guilty as to all four counts against him (R.30:90). The Petitioner appealed his conviction (R.8:1806). On appeal, the appellate court reversed the Petitioner's conviction as to Counts 4 and 5, the marijuana conspiracy charges, but affirmed the conviction as to Counts 1 and 2, finding that the two predicate crimes, the conspiracy to kidnap "Rogelio" and the conspiracy to murder "Rogelio" constituted the requisite pattern of racketeering activity.

REASON FOR GRANTING THE PETITION

THE DECISION OF THE APPELLATE COURT BELOW, WHICH DETERMINED THAT THE ALLEGED AGREEMENT TO KIDNAP AND MURDER ONE "ROGELIO" SHOULD NOT BE CONSIDERED ONE ACT AND CONSTITUTED A PATTERN OF RACKETEERING ACTIVITY IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD.

The Racketeering Influences and Corrupt Organizations Act (RICO) was enacted by Congress primarily as a means of combining existing criminal behavior to create a new offense subject to more severe punishment. See 18 U.S.C. § 1961 *et seq.* (1984). For one to be found guilty of committing the substantive RICO offense, one must engage in, amongst other things, a "pattern of racketeering activity". A "pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as requiring:

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last which occurred within ten (10) years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1961(56) (1984).

The legislative history of the RICO Act indicates that one isolated activity is insufficient to trigger remedies under the RICO statute and two isolated acts of racketeering activity do not constitute a pattern of activity. As was set forth in the RICO bill Senate Report:

> The target of (RICO) is thus not sporatic activity. The infiltration of legitimate business activity normally requires more than one racketeering activity and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

S. Rep. No. 91-67, p. 158 (1969) (emphasis added). Senator McClellan, one of the two sponsors of the RICO bill, quoted a portion of this Senate Report and stated: "The term 'pattern' itself requires a showing of relationship . . . so proof of two acts of racketeering activity, without more, does not establish a pattern. . . . " 116 Cong. Rec. 18940 (1970).

Unfortunately, the definition of "pattern of racketeering activity" as set forth in the statute did not adequately define what was meant by or what would constitute a "pattern of activity", but merely set forth what "acts" would be required, in quantitative terms, in order to establish a "pattern of activity". Even Congress' attempt to clarify and define the phrase "pattern of racketeering activity" did not provide the courts with sufficient guidance in order to evaluate cases in which a person or persons have been charged with violating the RICO statute.

Recently, in *Sedima Sprl. v. Imrex Company, Inc.*, ____ U.S. ____, 105 S.Ct. 3275 (1985), this Honorable Court addressed the issue of whether or not a plaintiff in a private RICO action must establish a "racketeering injury" as opposed to an injury resulting from the predicate acts themselves in order to recover. 105 S.Ct. at 3285. In addressing this issue, this Court also set forth, in footnote 14 of the opinion, a discussion of what would constitute a "pattern of racketeering activity" pursuant to the RICO statute. In *Sedima*, this Court attempted to set lower courts straight in determining what would constitute a pattern of racketeering activity. The majority of pre-*Sedima* decisions had concluded that a "pattern" of racketeering activity could be proven

simply by showing the commission of two acts of "racketeering activity" within the last ten years. *See Alexander Grant v. Tiffany*, 742 F.2d 408, 410 (8th Cir. 1984), *vacated*, ____ U.S. ____, 105 S.Ct. 3550 (1985), *on remand*, 770 F.2d 717 (8th Cir. 1985); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (two acts occurring on the same day, in the same place, and forming a part of the same criminal episode, constituted a "pattern of racketeering activity" pursuant to RICO statute). This Court in *Sedima* indicated that it disagreed with such an overly-broad construction of the term "pattern" and the assumption made by many courts that any two acts simultaneously constituted a pattern:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in Section 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," Section 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern". The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [*RICO*] is thus not sporatic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat

> of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91–617, p.158 (1969) (emphasis added).

105 S.Ct. at 3285 n.14.

Post-*Sedima* circuit and district courts have accepted the Supreme Court's definition of a "pattern of racketeering activity" and have properly applied *Sedima* under the facts and circumstances of their particular cases. *See Marks v. Forster*, Case No. 86–1609 (7th Cir., Feb. 9, 1987); *Torwest DBC, Inc. v. Dick*, Case No. 86–1450 (10th Cir., Jan. 20, 1987); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (scheme to achieve single discrete objective does not create threat of ongoing activity and additional evidence must be shown to establish pattern of racketeering activity); *Bank of America National Trust and Savings Association v. Touche Ross and Company*, 782 F.2d 966 (11th Cir. 1986) (allegation in indictment of nine separate acts of wire and mail fraud, involving same parties over period of three years, were not isolated acts of racketeering activity, but were sufficient to show pattern of racketeering activity because of threat of continuing activity); *Superior Oil Company v. Fulmer*, 785 F.2d 252 (8th Cir. 1986) (Superior Oil Company failed to prove "continuity" sufficient to form "pattern of racketeering activity" since record revealed one isolated fraudulent scheme and no threat of continuing activity); *contra, Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986) (ongoing scheme itself sufficient to satisfy continuity element of RICO pattern); *see also, Medallion TV Enterprises, Inc. v. SelecTV of California,*

Inc., 627 F.Supp. 1290 (D.C. Cal. 1986) *Graham v. Slaughter*, 624 F.Supp. 222 (N.D. Ill. 1985); *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828 (N.D. Ill. 1985).

In *Medallion TV Enterprises*, the California district court discussed what must be proven in order to show "relatedness" and "continuity" of the predicate acts sufficient to prove this "pattern of racketeering activity". The relatedness of the predicate acts is "established through proof of common perpetrators or victims, or similar purposes, results, or methods of commission." 627 F.Supp. at 1296, *citing Sedima, supra.* In order to show a "continuity" of racketeering activity, it must be alleged and proven that the predicate acts occurred in different criminal episodes. *Id.*

> The requirement that plaintiffs in a RICO action demonstrate that the predicate acts occurred in different criminal episodes is consistent with the connotation of multiple events implicit in the term "pattern" and, more importantly, is the only construction that gives meaning to Congress' intended rejection of RICO liability predicated upon isolated or sporatic criminal acts. *See* ABA § Corporation, Banking and Business Law, Report of the Ad Hoc Civil RICO Task Force, p. 203-208 (1985) (" 'pattern' requirement was intended as a means of limiting RICO to those cases where the required predicate offenses were committed in a manner which characterizes the perpetrator as a person who commonly commits such crimes. Only by requiring

> multiple predicate offenses occurring in two or more separate criminal episodes, can this goal be achieved in the RICO statute.") RICO is "not aimed at the isolated offender." *Sedima*, 105 S.Ct. at 3285 n. 14 (*quoting* 116 Cong. Rec. 35193 (1970)).

Medallion, 627 F.Supp. at 1296.

In *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F.Supp. 828 (N.D. Ill. 1985), the Illinois district court held that a complaint alleging two predicate acts occurring within a month, failed to state a claim under RICO because such acts did not constitute a "pattern". *Id.* at 833. As the court found, even if three more acts were alleged in the complaint, and occurred seven to ten months after the first two, they would prove to be predicate acts, however these five would still not show a "pattern" because "[t]hey still implemented the *same* fraudulent scheme as the first two mailings—and the single scheme does not appear to represent the necessary 'pattern of racketeering activity'." *Id.* (emphasis added). The court further found that the word "pattern":

> connotes a multiplicity of events: surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Id. at 831 (emphasis in original).

Thus, it is apparent that the post-*Sedima* trend has been to limit the previous broad application of the term "pattern" and no longer to assume that any two acts would automatically constitute a pattern. The post-*Sedima* courts have also heeded this Court's construction of the term "pattern" in *Sedima* and have properly recognized that not enough emphasis has been placed on the fact that a "pattern" connotes a multiplicity of events, and not merely repeated acts to carry out the same criminal activity.

In the present petition, the Petitioner raises several arguments. First, the Petitioner claims that the conversation between he and Cheo Fernandez simply did not rise to the definition of a "pattern of racketeering activity". At most, the predicate act was the alleged *agreement* to kidnap and murder one "Rogelio", and not two separate predicate acts of conspiracy to kidnap and conspiracy to murder one "Rogelio". Clearly, the November 5, 1983 conversation did not reflect any actual agreement to violate any portion of the RICO statute or that portion relating to kidnapping or murder. The discussion about "Rogelio", at best, constituted mere preparation. The law recognizes a clear distinction between an "agreement" and mere conversation or preparation. *See United States v. Anderson*, 651 F.2d 375 (5th Cir. 1981).

Second, even assuming *arguendo* that the Eleventh Circuit properly found that the evidence at trial demonstrated two separate predicate acts, the court did not indicate that anything more was shown other than these two predicate acts. The appellate court seemingly reverted to the pre-*Sedima* line of cases since it assumed

that any two acts would automatically constitute a pattern of racketeering activity. Thus, the Eleventh Circuit Court of Appeals has failed to recognize this Court's decision and explanation of a "pattern of racketeering activity" as set forth in *Sedima*, and has further failed to conform to other circuit and district court decisions and properly apply *Sedima*. The Eleventh Circuit has failed to recognize that a "pattern" connotes a multiplicity of events and not merely repeated acts to carry out what would be the same criminal activity. The appellate court has also failed to recognize that the type of activity in which the Petitioner was alleged to have been involved in the present case is not the type of "continuous criminal activity" for which the RICO statute was intended to apply.

Without a clear Supreme Court ruling, the Eleventh Circuit will continue to misapply this Court's prior decision in *Sedima*, and a divergence of opinion between the circuit and district courts will continue to result.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Fernando FERNANDEZ, Rafael Enrique Franjul, a/k/a Frank Sinatra,
Defendants-Appellants

No. 85-5311

United States Court of Appeals,
Eleventh Circuit.

Aug. 26, 1986.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 83-993 CR-ALH, Alcee L. Hastings, J., of RICO and narcotics conspiracies, and they appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that: (1) evidence was insufficient to demonstrate conspiracy to possess marijuana, so that coconspirator statements concerning marijuana conspiracies were not admissible against first defendant; (2) coconspirator statements concerning marijuana conspiracies were admissible as to RICO conspiracy; (3) second defendant's statements demonstrated existence of separately charged marijuana conspiracies in which defendant was a member, so that coconspirator statements made in furtherance of the conspiracies were admissible; (4) evidence sufficiently showed agreement

by defendant to violate RICO; and (5) defendants were not entitled to disclosure of location of hidden transmitter.

Affirmed in part and reversed in part.

1. **Criminal Law —427(3, 5)**

In order for coconspirator statements to be properly admitted, substantial independent evidence must show that a conspiracy existed, declarant and defendant were members of the conspiracy, and statements were made in furtherance of the conspiracy; district court has discretion to admit statements subject to proof of these requirements during course of the trial. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

2. **Criminal Law —427(5)**

Evidence that defendant engaged in conversation with third party regarding plane capable of transporting marijuana was insufficient to demonstrate conspiracy to possess marijuana, so that coconspirator statements concerning marijuana conspiracies were not admissible against defendant. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

3. **Criminal Law —422(1)**

Coconspirator statements concerning marijuana conspiracies, which were inadmissible against defendant on charges of conspiracy to import and possess marijuana with intent to distribute, were admissible as to RICO conspiracy, where alleged purpose of RICO

enterprise was to import and distribute marijuana and statements showed defendants' previous and continuing relationship to enterprise. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.; 18 U.S.C.A. § 1961 et seq.

4. Criminal Law —427(5)

Defendant's statements which revealed his knowledge of specific dates and times of various marijuana shipments, as well as his knowledge of people involved in those shipments, demonstrated existence of separately charged marijuana conspiracies in which defendant was a member, so that coconspirator statements made in furtherance of the conspiracies were admissible. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

5. Conspiracy —47(12)

Evidence that defendant recommended pilot to person who wished to import marijuana by air was insufficient to show conspiracy to possess marijuana with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

6. Conspiracy —28(1)

To establish conspiracy to violate RICO, Government must prove that defendant, by his words or actions, objectively manifested agreement to participate, directly or indirectly, in the affairs of the enterprise, through patterns of racketeering activity. 18 U.S.C.A. § 1961 et seq.

7. Conspiracy —47(12)

Evidence that defendant knowingly agreed to further objective of narcotics smuggling enterprise by agreeing to kidnap and murder individual who had stolen from the enterprise and whose conduct, if allowed to go unpunished, would compromise integrity and reputation of the enterprise sufficiently showed agreement by defendant to violate RICO as element of RICO conspiracy. 18 U.S.C.A. § 1961 et seq.

8. Conspiracy —47(3)

Evidence that defendant planned to kidnap and murder the same person demonstrated two predicate crimes chargeable under Florida law, constituting requisite pattern of racketeering activity necessary to support RICO conspiracy charge, where victim's kidnapping and subsequent confinement would not have been merely incidental to or inherent in his killing. West's F.S.A. §§ 782.04, 787.01(1)(a); 18 U.S.C.A. § 1961 et seq.

9. Conspiracy —47(12)

Defendant's statements to coconspirator about their past marijuana ventures revealed his association with marijuana importing enterprise for purposes of RICO conspiracy charge. 18 U.S.C.A. § 1961 et seq.

10. Criminal Law —700(3)

Defendants were not entitled to disclosure of location of hidden transmitter as well as means of transmission and other related technical information for purposes of

challenging validity of voice identification, where voice identification was not at issue at defendants' trial. U.S.C.A. Const. Amend. 6.

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Ronald A. Dion, Entin, Schwartz, Dion & Scalfani, Jonathan B. Blecher, North Miami Beach, Fla., for Franjul.

Leon Kellner, U.S. Atty., Barbara Petras, Asst. U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY and CLARK, Circuit Judges, and GIBSON*, Senior Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge:

The appellants, Fernando Fernandez and Rafael Franjul, challenge their convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq,* and under the federal statutes prohibiting conspiracies to import marijuana and to possess marijuana with the intent to distribute, 21 U.S.C. §§ 952, 963, 841, 846. For the reasons discussed below, we affirm the RICO convictions and Franjul's marijuana conspiracy convictions, but reverse Fernandez' marijuana conspiracy convictions.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

A federal grand jury returned a multicount indictment charging several individuals, including the appellants, with racketeering and other related crimes as a result of their association with and participation in an illegal narcotics enterprise. Fernando Fernandez was charged in Count I with conspiracy to violate RICO, in Count II with a substantive violation of RICO, in Count IV with conspiracy to import marijuana, and in Count V with conspiracy to possess marijuana with intent to distribute. As RICO predicate acts for both the RICO conspiracy and the substantive violation, Fernandez was charged with conspiracy to kidnap Rogelio, a man believed by Fernandez to have stolen the enterprises's marijuana; conspiracy to murder Rogelio; and, as one predicate act, the marijuana conspiracies charged in Counts IV and V.[1] Rafael Franjul was charged in Count I with conspiracy to violate RICO and in Counts IV and V with conspiracy to import marijuana and conspiracy to possess marijuana with the intent to distribute. As predicate acts for the RICO conspiracy, Franjul was charged with conspiracy to kidnap Moises Perez, a man believed by Franjul to be a government informant; conspiracy to murder Perez; and, as one predicate act, the marijuana conspiracies charged in Counts IV and V.

I. COCONSPIRATOR STATEMENTS

Both Fernandez and Franjul contend that the district court erred in failing to make separate *James*

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[1]Fernandez was also charged, as a predicate act, with conspiracy to murder a man named Prieto. The government dismissed this charge, however, during trial.

determinations as to each conspiracy charged. We address this issue as a preliminary matter so that we can properly review the evidence against them.

[1] In *United States v. James,* 590 F.2d 575, 581 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the court held that coconspirator statements introduced pursuant to Fed.R. Evid. 801(d)(2)(E) are not properly admitted until, as a preliminary matter, the government shows substantial independent evidence of a conspiracy. More specifically, the substantial independent evidence must show that (1) a conspiracy existed, (2) the declarant and the defendant were members of the conspiracy, and (3) the statements were made in furtherance of the conspiracy. *Id. See* Fed.R.Evid. 801(d)(2)(E). The district court has discretion to admit the statements subject to proof of these three requirements during the course of the trial. *United States v. Hewes,* 729 F.2d 1302, 1312 (11th Cir. 1984), *cert. denied, Caldwell v. U.S.,* 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985).

The district court reserved ruling until the close of the government's case, at which time it determined that the government had satisfied the *James* standard as to the RICO conspiracy (Count I). The district court again reserved ruling on the admissibility of coconspirator statements as to the separately charged marijuana conspiracies (Counts IV and V), but indicated a belief in the government's argument that all coconspirator statements were admissible as to all counts since the *James* standard had been satisfied as to the RICO conspiracy. At the conclusion of the evidence, the defendants renewed all outstanding motions. The distrct

court did not determine whether the *James* standard had been satisfied as to Counts IV and V. Fernandez and Franjul contend that the district court erred in this respect. They argue that in the absence of a *James* determination the coconspirator statements regarding the separately charged marijuana conspiracies should not have been admitted as evidence against them on Counts IV and V.

Failure to make a specific *James* determination is harmless error if the record demonstrates admissibility. *United States v. Monaco,* 702 F.2d 860, 878 (11th Cir. 1983); *United States v. Bulman,* 667 F.2d 1374, 1830 (11th Cir.), *cert. denied,* 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). After reviewing the record, we conclude that the record does not demonstrate admissibility of the coconspirator statements against Fernandez on the separately charged conspiracies to import marijuana and possess marijuana with the intent to distribute as alleged in Counts IV and V. We hold that the independent evidence does not establish the existence of these conspiracies, the first *James* requirement. We hold, however, that the record demonstrates admissibility of the coconspirator statements against Franjul on the separately charged marijuana conspiracies.

[2] The government acknowledged during oral argument that the only evidence that Fernandez conspired to import marijuana was the following portion of his conversation with Cheo on November 5, 1983:

CHEO:[2] I asked for you to come . . . do you know anything about a plane, a DC-6 something like that, that can be obtained somewhere, to drop it over there. (whispering) (UI) [unintelligible] the farm. . . .

FERNANDEZ: A DC-6? Damn, that's a big plane.

CHEO: A DC-6, yes, a DC-3.

FERNANDEZ: A DC-3 is also big.

CHEO: (UI)

FERNANDEZ: 6,000 pounds, 4,000 something.

CHEO: No, 4,500 not 6,000, so it won't fall.

FERNANDEZ: Well, you know that I don't have any connections with that.

CHEO: I have, I have . . .

FERNANDEZ: I know a pilot.

. . . .

CHEO: . . . . I need, I was looking for, to see if I get a small plane.

---

[2]Cheo was an indicted coconspirator who is not involved in this appeal. See Part II for more details.

FERNANDEZ: Now, I know a pilot who's very bold, he's a good sort, Luis . . . "El Chino Luis", but that I know, well, unless he has some contacts with somebody.

CHEO: One thing I was going to tell you, Fernando |Fernandez| (UI).

Appendix to Appellant's Brief at 26-28. Even when considering the coconspirator statements here, we cannot say that this discussion amounted to an agreement to import marijuana. Merely providing Cheo with the name of a pilot in response to Cheo's inquiry about a plane that was capable of transporting a hypothetical load of marijuana does not constitute an agreement.

The government also acknowledged during oral argument that the references to marijuana ventures were the only evidence that Fernandez conspired to possess marijuana with the intent to distribute. The vague discussions of past marijuana ventures cannot be considered evidence upon which a conviction for conspiracy to possess marijuana may be upheld.

[3] The independent evidence does not demonstrate the existence of conspiracies in this case. Therefore, the coconspirator statements concerning the marijuana conspiracies should not have been admitted against Fernandez as evidence on Counts IV and V. Although inadmissible as to Counts IV and V, these coconspirator statements are admissible as to the RICO conspiracy. The RICO conspiracy is a broad concept and encompasses a great variety of conduct. *United States*

v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984). It is not disputed that the purpose of the enterprise involved in this case was to import and distribute marijuana. The coconspirator statements concerning the alleged marijuana conspiracies show Fernandez' previous and continuing relationship to the enterprise, and therefore are admissible to that extent.

Fernandez also argues that the government failed to prove that he agreed to commit the kidnapping and murder of Rogelio. We disagree. As discussed in more detail in Part III of our opinion, the independent evidence demonstrates the existence of these conspiracies.

[4] With respect to Franjul, we hold that the record demonstrates admissibility of the coconspirator statements against him as to the separately charged marijuana conspiracies alleged in Counts IV and V. Franjul's own statements supply the requisite independent evidence of the existence of the agreements to import and to possess marijuana with the intent to distribute. *See United States v. Zielie*, 734 F.2d 1447, 1457 (11th Cir.1984) ("a defendant's own statements constitute independent evidence for purpose of applying the *James* standards"), *cert. denied*, ____ U.S. ____, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). During his conversation with Cheo on November 19, 1983, Franjul demonstrated his association with Cheo and the enterprise. Franjul revealed his thorough knowledge of specific dates and times of various shipments of marijuana, as well as his knowledge of the people involved in those shipments. He also revealed his participation in one particular shipment. Franjul stated

that he had posted bond for the employees who were arrested while attempting to import several thousand pounds of marijuana. More importantly, Franjul revealed the conspiracy to import marijuana. He reported to Cheo: "I . . . I'm planning to go with one of those small airplanes, nine thousand, nine thousand, nine thousand." Appendix to Appellant's Brief at 1. Franjul admitted during cross-examination that he was referring to the transportation of nine thousand pounds of marijuana by plane. Record XXIX at 164. Franjul was reporting the specific method of importation and the amount to be imported. We hold that this evidence and the reasonable inferences that can be drawn from it demonstrate the existence of the separately charged marijuana conspiracies, that Cheo and Franjul were members of the conspiracies, and that the statements were made in furtherance of the conspiracies. Therefore, we conclude that the district court did not err in admitting these statements against Franjul on the marijuna conspiracies separately charged in Counts IV and V. These statements are also admissible against Franjul as edvidence of the broader RICO conspiracy charge in Count I. The statements show his previous and continuing relationship to the enterprise.

In sum, we hold that the record does not demonstrate admissibility of the coconspirator statements against Fernandez concerning the marijuana conspiracies charged in Counts IV and V. The statements are admissible, however, on the RICO conspiracy charge. We hold that the record demonstrates admissibility of coconspirator statements against Franjul concerning the marijuana conspiracies charged in Counts IV and V. We also hold that these statements are admissible against

Franjul on the RICO conspiracy charge. Having made the preliminary determinations, we now review the evidence.

II. EVIDENCE

The evidence reviewed in a light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), establishes the following facts. The mastermind of the enterprise was Jose Manuel Fernandez-Toledo, also known as Cheo Fernandez (referred to here as Cheo). Cheo was under investigation by federal officials, who had placed an informant in Cheo's organization, and who were recording conversations in Cheo's office. The recordings revealed that marijuana was being imported on a daily basis and stored in stash houses. The recordings also revealed that Cheo was becoming frustrated by the seizures of his marijuana and the arrests of his offload personnel. As a result, Cheo became interested in changing his importation methods.

Cheo's desire to import by air instead of by sea was disclosed in his conversation with appellant Fernandez in Cheo's office on November 5, 1983. Cheo and Fernandez discussed importing marijuana. During the conversation, Fernandez provided Cheo with the name of a "very bold" pilot. The discussion then turned to a previous marijuana venture that was mishandled by other members of the enterprise. The crux of this part of the conversation was that the enterprise's creditors wanted their money. The discussion turned to another venture in which the enterprise's marijuana had been

stolen. Fernando initiated this discussion, complaining to Cheo that he could not sleep because of "Rogelio." The two concluded that it was Rogelio who had stolen their marijuana. The two agreed that Rogelio must be located, abducted, taken to the farm, and killed. Fernando and Cheo then planned how Rogelio would be abducted and killed.

Cheo engaged in a similar conversation with appellant Franjul. On November 19, 1983, Franjul met with Cheo at Cheo's office. At that meeting, Franjul reported his plan to import nine thousand pounds of marijuana by airplane. Franjul then told Cheo that he believed that the government had an informant in Cheo's organization, one who was very close to Cheo. Although Cheo was reluctant to acknowledge the existence of an informant in the organization, Franjul finally convinced him that it was true. The two men concluded that the informant was Moises Perez. Cheo and Franjul agreed that Perez must be found, taken to the farm, and killed. They then planned how Perez would be abducted and killed.

Following a bench trial, Fernandez and Franjul were convicted as charged in the indictment. Fernandez was sentenced to twelve years incarceration for the RICO conspiracy and for the substantive violation of RICO (Counts I and II), to run concurrently. He was sentenced to five years probation for the marijuana conspiracies (Counts IV and V), to run concurrently with each other and consecutively to the sentences on Counts I and II. Franjul was sentenced to twelve years incarceration on Count I, and five years probation on Counts IV and V, to run concurrently with each other and consecutively to Count I.

On appeal, in addition to the *James* contentions already discussed, Fernandez contends that the evidence is insufficient to sustain his convictions on all counts. Franjul contends that the conspiracies to kidnap and to murder Perez should be considered one predicate act, which would not constitute the requisite "pattern of racketeering activity." Both Fernandez and Franjul contend that the district court erred in ruling that the government need not disclose certain technical information concerning the intercepted conversations.

III. SUFFICIENCY OF THE EVIDENCE

[5] Fernandez contends that the evidence is insufficient to sustain his marijuana conspiracy convictions as charged in Counts IV and V. Because we concluded for purposes of *James* determinations that the evidence did not demonstrate the existence of conspiracies by Fernandez to import marijuana and to possess marijuana with the intent to distribute, we hold that the evidence also is insufficient to sustain his convictions on these charges. The essential element in a prosecution for such conspiracies in an *agreement* between two or more persons to violate narcotics laws. *United States v. Figueroa*, 720 F.2d 1239, 1244 (11th Cir. 1983); *United States v. Lee*, 694 F.2d 649, 652 (11th Cir.), *cert. denied*, 460 U.S. 1086, 103 S.Ct. 1779, 76 L.Ed.2d

350 (1983).[3] As we said, that essential element is missing in this case. We recognize, as the government argues, that detailed contract language is seldom used by narcotics conspirators. More specific language is required, however, than merely "I know of a pilot who is very bold . . . Luis . . . 'El Chino Luis.' " We also recognize that a conspiracy may be proved by circumstantial evidence. *United States v. Walker,* 720 F.2d 1527, 1538 (11th Cir.1983), *cert, denied,* 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). By his own statements, Fernandez was involved in past marijuana ventures with Cheo. As we said, however, this evidence alone is insufficient to show a conspiracy to possess marijuana with the intent to distribute in this case. Consequently, we reverse Fernandez' convictions on Counts IV and V.

Next, Fernandez challenges his RICO convictions. Fernandez contends that the evidence is insufficient to sustain his convictions for a RICO conspiracy (Count I) and for a substantive violation of RICO (Count II). As a result of our decision concerning the marijuana conspiracies, only two predicate crimes remain that form

---

[3]To prove a conspiracy to import a controlled substance in violation of 21 U.S.C. § 963, the government must show "(1) the existence of an agreement (2) to import (3) a controlled substance (4) into the United States and (5) the defendant's knowing and voluntary participation in the agreement." *United States v. Boldin,* 779 F.2d 618, 619 (11th Cir.) (modifying *United States v. Boldin,* 772 F.2d 719, 727 (11th Cir. 1985)), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986). To prove a conspiracy to possess a controlled substance in violation of 21 U.S.C. § 846, the government must "show (1) the existence of an agreement (2) to possess (3) with intent to distribute (4) a controlled substance and (5) the defendant's knowing and voluntary participation in the agreement." *Id.*

the basis of these counts. The predicate crimes are the conspiracy to kidnap Rogelio and the conspiracy to murder Rogelio. Specifically, Fernandez argues that the government failed to establish any agreement on his part, that the conspiracies to kidnap and murder should be treated as one act, and that the evidence does not demonstrate that he was associated with Cheo's enterprise.

Again, the basis of Fernandez' RICO convictions was his conversation with Cheo on November 5, 1983. Fernandez initiated that portion of the conversation in which they discussed the kidnapping of Rogelio. Fernandez complained to Cheo that he was having trouble sleeping because of Rogelio. Fernandez and Cheo agreed that it was Rogelio who had stolen their marijuana during a previous venture. Rogelio was the mechanic who had prepared the truck that was used in transporting the marijuana, and he also knew the location of their "stash house." Fernandez stated that Rogelio must be killed, but that he did not "have a place to do it." Fernandez explained to Cheo his plan of abducting Rogelio. Fernandez would tell Rogelio that they wanted him to look at some cars, and when Rogelio "gets in the car, take him to the ranch and then say to him, look brother, you know how it is, you were the one who stole . . . the material, the grass, where is your buddy and if you don't talk then you'll go under, now look how it is. You're going to talk and you're also going to give money." Fernandez did not own a ranch, but he knew that Cheo owned one farm and had access to another. Cheo told Fernandez that a problem existed with Fernandez' plan. Cheo warned that "if that guy is grabbed . . . [he] can't be let [go] anymore. He can't come here." Fernandez agreed. Cheo made himself very

clear: Rogelio "must die, even if he talks . . . or doesn't talk." Fernandez agreed. Cheo then suggested an alternate plan—sending Rogelio a letter threatening him, warning him that he was being watched, and demanding to know the whereabouts of his accomplice. Cheo reminded Fernandez that Rogelio still "has to be killed." Fernandez agreed:

> FERNANDEZ: He has to be hit.
>
> CHEO: He has to get hit and set fire to him, later won't find him. . . .
>
> . . .
>
> Look a dead person found, dead person investigated, no dead man found, no dead man investigated.
>
> FERNANDEZ: Right. That's correct. That's right.

Fernandez and Cheo worked out the details of Cheo's plan. Fernandez expressed concern that the letter might alert Rogelio, and give him the opportunity to "leave town." Cheo assured Fernandez that Rogelio would always be watched. Fernandez also expressed concern about whether Rogelio would know who sent the letter. Cheo assured Fernandez that the letter would clearly state that "these are the owners of the material (marijuana), we're ready for you, looking in your direction." Cheo and Fernandez then planned how Rogelio would be abducted. Rather than using the automobile ruse, Cheo told Fernandez that his men would "take Rogelio in front of people, and get a hold of him, tie him, pick him up and take him away." Fernandez agreed: "Well man, there's no other

alternative, so you know. There's no other alternative. Just that one." Then Fernandez told Cheo that he (Fernandez) would do the actual killing:

> FERNANDEZ: . . . . Cheo, if he has to be hit, he'll be hit, I'll hit him myself. (Pause) But I need a place to put him.
>
> CHEO: Yes that can be done, it can be done.

Fernandez then explained that the place must impress upon Rogelio the seriousness of the situation and cause him to "talk about everything." Fernandez detailed what he would say to force Rogelio to talk: "Look you're imprisoned here, . . . you better talk about everything if you want to save yourself, and if he doesn't talk, or speaks, or if he spits everything out and declared everything, hit him, hit him and bury him." The two agreed that their reputations were at stake.

Fernandez argues that this conversation does not show that he agreed to violate RICO, or that he agreed to kidnap and murder Rogelio. At most, he argues, the conversation shows that he and Cheo were mad at Rogelio and that they made "rash statements" about him.

[6] To establish a conspiracy to violate RICO, the government must prove that the defendant, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of the enterprise, through a pattern of racketeering activity. *United States v. Bright,* 630 F.2d 804, 834 (5th Cir.1980). A pattern "requires at least two acts of racketeering

activity." 18 U.S.C. § 1961(5) (1982). "Racketeering activity" is defined as "any act or threat involving murder, kidnapping, . . . which is chargeable under State law." 18 U.S.C. § 1961(1)(A) (Supp.1984) Conspiracy to kidnap and conspiracy to murder are chargeable under Florida law. *See* Fla. Stat. Ann. §§777.04, 787.01, 782.04 (Supp. 1986).

[7] We hold that the above conversation between Cheo and Fernandez clearly demonstrates an agreement by Fernandez to participate in the affairs of Cheo's enterprise. Fernandez knowingly agreed to further the objective of the enterprise (narcotics smuggling) by agreeing to kidnap and murder an individual who had stolen from the enterprise and whose conduct, if allowed to go unpunished, would compromise the integrity and reputation of the enterprise. By his own words, Fernandez agreed to commit the two predicate acts necessary to form the basis of the RICO charges. Under Florida law, the conspiracy is complete "once the intent is formed and the agreement made." *Ethridge v. State,* 415 So.2d 864, 864 (Fla.Ct.App.1982). The government need not prove that the defendant undertook any overt act in furtherance of the conspiracy. *Id.* The evidence amply demonstrates Fernandez' intent and agreement to forcibly abduct and confine Rogelio against his will with the intent to commit or facilitate murder or to inflict bodily harm upon him. *See* Fla. Stat. Ann. § 787.01(1)(a) (Supp.1986) (Florida kidnapping statute). The evidence also clearly demonstrates Fernandez' intent and agreement to unlawfully kill Rogelio. *See* Fla. Stat. Ann. §782.04 (Supp.1986) (Florida murder statute). Fernandez not only agreed that Rogelio must be killed, but also that he (Fernandez) would do the killing himself. Therefore, we conclude that the evidence

sufficiently shows an agreement by Fernandez to violate RICO through the agreements to kidnap and murder Rogelio.

[8] Fernandez also argues that the conspiracies to kidnap and murder the same person should be considered one crime. He argues that the planned confinement of Rogelio merely would have been incidental to the murder. We disagree. The Florida Supreme Court has addressed the issue and cited with approval the following test:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Faison v. State, 426 So.2d 963, 965 (Fla. 1983) (quoting *State v. Buggs,* 219 Kan. 203, 215–17, 547 P.2d 720, 731 (1976)). The evidence in this case satisfies the above test. Both Cheo and Fernandez agreed that abducting Rogelio and confining him at the farm would serve three purposes, which were independent of the act of killing

Rogelio. The abduction and confinement would allow them to obtain information from Rogelio, would serve as an example to the community, and would lessen the detection of the murder. The confinement here would have not been merely incidental to or inherent in the killing of Rogelio. The confinement clearly would have had independent significance.[4] Accordingly, we hold the evidence demonstrates two predicate crimes chargeable under Florida law, constituting the requisite pattern of racketeering activity.[5]

Although Franjul does not challenge the sufficiency of the evidence, he, like Fernandez, argues that the conspiracies to kidnap and murder should be treated as one predicate crime. We need not address Franjul's argument. Even if the conspiracies to kidnap and murder government informant Moises Perez are considered one predicate crime, the marijuana

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[4]The movement from Rogelio's house or place of business to the farm would certainly amount to more than an inconsequential movement like that found in *Chaney v. State*, 464 So.2d 1261, 1263 (Fla.Ct.App.1985), where the court held that placing robbery victims in a bathroom, during and after the robbery, from which they escaped within minutes or seconds, did not amount to kidnapping. Indeed, the movement and confinement of Rogelio in this case would be much more consequential than the movement in *Carter v. State*, 468 So.2d 370, 371 (Fla.Ct.App.1985), where the court held that the movement of a robbery victim from outside to inside a building may not be characterized as inconsequential.

[5]Two isolated acts of racketeering, without more, do not constitute a pattern. "It is [the] factor of *continuity plus relationship* which combines to produce a pattern." *Sedima, S.P.R.L. v. Imrex Co.*, ____ U.S. ____, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985) (emphasis in original) (quoting S.Rep. No. 91–617, p. 158 (1969)). In this case, Fernandez's acts were not isolated. The conspiracies to kidnap and murder Rogelio were closely related to each other and to the ongoing objective of narcotics smuggling.

conspiracies constitute the other predicate crime, forming the requisite pattern of racketeering activity.[6]

[9] Finally, Fernandez argues that the government did not prove that he was associated with Cheo's enterprise. We disagree. Fernandez' own statements to Cheo about their past marijuana ventures reveal his association with the enterprise. More importantly, his statements concerning Rogelio are dispositive of this association.

In sum, we hold that the evidence is insufficient to sustain Fernandez' marijuana conspiracy convictions. The evidence is sufficient, however, to sustain his RICO convictions. The evidence demonstrates Fernandez' intent and agreement to participate in the affairs of the enterprise through his agreements to kidnap and murder Rogelio. The conspiracies to kidnap and murder Rogelio are two predicate acts, constituting the requisite pattern of racketeering activity. Because Franjul's marijuana conspiracies form a second predicate act, we need not address his argument concerning the conspiracies to kidnap and murder Perez. The evidence also is sufficient to establish that Fernandez was associated with Cheo's enterprise.

IV. DISCLOSURE OF TECHNICAL INFORMATION

[10] Fernandez and Franjul filed a motion to disclose the location of the transmitter and the container

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[6] *See supra* note 5. The marijuana conspiracies and the conspiracies to kidnap and murder the informant were not isolated acts. Franjul entered into these conspiracies for the purpose of furthering the enterprise's objective of narcotics smuggling.

in which it was hidden, as well as the means of transmission and other related technical information. The district court ordered disclosure. Upon the government's motion to reconsider and after an *in camera* hearing, the court vacated its previous order. The district court ruled that the defendants were entitled to disclosure of some transmitter information, but denied the defendant's request in all other respects. The district court did not indicate the grounds on which it denied the request.

The government had argued that the information sought was subject to a qualified privilege or that it was protected because of national security concerns. Recently, in *United States v. Van Horn,* 789 F.2d 1492, 1508 (11th Cir.1986), this court held that the qualified government privilege not to disclose sensitive investigative techniques applies "to the nature and location of electronic surveillance equipment." The court noted that disclosure of the location of surveillance devices or their precise specifications will, among other things, educate criminals on how to protect themselves. The court stated, however, that "[t]he privilege will give way if the defendant can show need for the information." *Id.* The court did not establish any fixed rules on disclosure of electronic surveillance techniques, stressing that "the necessity determination requires a case by case balancing process." *Id.*

Fernandez and Franjul contend that voice identification was the "critical and crucial" issue at trial. They argue, therefore, that the information they sought was necessary to challenge the validity of voice identification. Failure to disclose the information, the

argument continues, resulted in a denial of their Sixth Amendment right to confront the witnesses against them.

We need not determine whether the information sought was privileged because we hold that in any event necessity has not been demonstrated. Contrary to their argument, voice identification was not an issue at the defendants' trial. Indeed, Franjul admitted on direct examination that his voice was on the tape recordings. Record XXIX at 131–32. Both Fernandez and Franjul took the position at trial that their statements meant something different than the interpretation given to them by the government. Moreover, the defendants had access to the original tape recordings, but never presented any evidence that voice comparisons were attempted yet inconclusive because of a lack of technical information. Consequently, the defendants have failed to demonstrate their necessity for the information.

We also need not determine whether such information was properly the subject of national security concerns. Because the information the defendants sought was not relevant to their defense, it cannot be said that they were denied a fair trial. *United States v. Porter,* 701 F.2d 1158, 1162 (6th Cir.) (ultimate question is whether defendants were denied a fair trial), *cert. denied,* 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983).

In sum, the defendants have not demonstrated the need or relevance of the information sought. Therefore, we hold that the district court did not err in denying the defendants' motion to disclose the surveillance information.

V. CONCLUSION

In conclusion, we AFFIRM Fernandez' RICO convictions as charged in Counts I and II. We REVERSE, however, Fernandez' conviction for marijuana conspiracies as separately charged in Counts IV and V. We AFFIRM Franjul's RICO conspiracy conviction, and his convictions for the separately charged marijuana conspiracies.

Supreme Court, U.S.
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No. 86-1577

In the Supreme Court of the United States

OCTOBER TERM, 1986

FERNANDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish that petitioner participated and conspired to participate in a "pattern of racketeering activity" within the meaning of 18 U.S.C. 1961(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 797 F.2d 943.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A petition for rehearing was denied on January 8, 1987. The petition for a writ of certiorari was filed on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count Two); conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d) (Count One); conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count Four); and conspiracy to possess marijuana

with intent to distribute it, in violation of 21 U.S.C. 846 (Count Five). He was sentenced to concurrent terms of 12 years' imprisonment on the RICO counts, and to concurrent five-year terms of probation on the drug conspiracy counts, to be served after completion of the prison sentence. On appeal, the court of appeals affirmed petitioner's RICO convictions but reversed his drug conspiracy convictions (Pet. App. A1-A26).

1. Most of the relevant evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A8-A11, A13-A14, A17-A19). It showed that Jose Manuel Fernandez-Toledo (also known as Cheo Fernandez) headed a marijuana smuggling and distribution operation. An informant placed in that organization recorded conversations in Cheo's office. The recorded conversations revealed that Cheo imported marijuana on a daily basis and stored it in "stash houses" pending distribution. The recordings also revealed that Cheo was becoming frustrated by the government's success in seizing shiploads of his marijuana and arresting the persons he had hired to unload the drugs. *Id.* at A13.

On November 5, 1983, Cheo and petitioner had a long conversation that centered on the importation of marijuana. A tape recording of that conversation, which took place in Cheo's office, was introduced at trial. It formed the main proof against petitioner.[1]

In the course of the recorded conversation, Cheo expressed his desire to import marijuana by air as well as by sea, and he asked petitioner's help in obtaining a DC-3

[1] Petitioner was identified as the person speaking with Cheo by video surveillance tapes showing him entering Cheo's office, by physical surveillance testimony, by voice identification, and by a comparision of the family relationships he discussed in the course of the tape-recorded conversation with the personal history information he gave at the time of his arrest. See 2 Trial Tr. 64-67, 99-102, 110; GX 105.

airplane capable of carrying 4,500 pounds of marijuana. Petitioner provided Cheo with the name of a "very bold" pilot. Pet. App. A9-A10. Cheo also told petitioner that, in addition to the fact that several boats loaded with marijuana had been seized, some of the other boats needed substantial repairs (GX 105, at 27). Cheo asked petitioner to examine one of the boats at the Manola Marina. Cheo warned petitioner, however, to be sure to wear a disguise when he did so (*id.* at 27-28).

The discussion then turned to an earlier attempt to import marijuana, which had been mishandled by other members of the enterprise (Pet. App. A13). Petitioner and Cheo discussed two brothers who had "screwed up" a load of marijuana that had been destined for a "guy from New York" (GX 105, at 15, 19, 23). Petitioner told Cheo that the brothers had to make good on the money owed for the marijuana (*id.* at 19). Petitioner stated that he had arranged to have the brothers "fucked really good" when they arrived in prison (*ibid.*), but that in the meantime the "creditors" wanted the money that was owed to them paid "right away" (*id.* at 14). Petitioner told Cheo that "old man Guerra," who had taken over the account, was a "real son of a bitch," and Cheo agreed that they had to pay Guerra the money (*id.* at 15). Later, again referring to the money owed to Guerra, petitioner stated: "Don't talk to me about money. Don't talk to me about money until a trip comes in and I can get something" (*id.* at 29).

In the course of the same conversation, petitioner told Cheo that he had trouble sleeping because of Rogelio, an associate who the two men believed had stolen marijuana from them (Pet. App. A17-A19). Petitioner told Cheo that Rogelio clearly was the one who had stolen the marijuana because Rogelio had readied the truck and knew about the stash house (GX 105, at 39). Petitioner proposed to lure

Rogelio to "the ranch"[2] and there to say to him: "Look brother, you know how it is, you were the one who stole * * * the material, the grass, where is your buddy and if you don't talk then you'll go under, now look how it is. You're going to talk and you're also going to give money." Pet. App. A17 (quoting from GX 105, at 36).

In response to petitioner's plan, Cheo stated: "The problem with that is, if the guy is grabbed * * * [t]hat guy can't be let [go] anymore" (GX 105, at 36-37). Cheo added, "He has to die, even if he talks. * * * Or doesn't talk." Petitioner agreed that Rogelio had to be killed (*id.* at 37). Cheo then said that after they killed Rogelio, they should set fire to his corpse so that no one would find it and start an investigation. Again, petitioner agreed. Pet. App. A18.

Cheo rejected petitioner's plan for luring Rogelio to the ranch and instead proposed that they "take [him] in front of people, and get a hold of him, tie him, pick him up and take him away" (Pet. App. A18). Petitioner replied, "Well man, there's no other alternative, so you know. There's no other alternative. Just that one." Petitioner then stated that he would do the actual killing himself. Petitioner said, "Cheo, if he has to be hit, he'll be hit, I'll hit him myself. (Pause) But I need a place to put him." Cheo responded, "Yes that can be done, it can be done." Pet. App. A19. Petitioner told Cheo that the place must impress Rogelio with the seriousness of the situation so that he would "talk about everything" (*ibid.*). Petitioner then explained that he would say to Rogelio: "Look you're imprisoned here, you're imprisoned and you better talk about everything, everything, if you want to save yourself. * * * And if he doesn't talk, or speaks, or if he spits everything out and declares everything, hit him, hit him and bury him." Petitioner explained that it couldn't be any other way because

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[2] Petitioner did not own a ranch, but he knew that Cheo owned one farm and had access to another (Pet. App. A17).

petitioner had to preserve his reputation as "the best person here moving material [*i.e.*, marijuana]." GX 105, at 39-40.

During the same conversation, Cheo also asked petitioner for assistance in providing papers for an armored car that Cheo had sent to his Colombian suppliers in payment for marijuana (GX 105, at 29-31, 33). Petitioner advised Cheo to report the car stolen (*id.* at 32, 42-43).

In addition to the tape-recorded conversation, Cheo's 1983 "yearbook" was introduced into evidence. The notations in the "yearbook" indicated that Cheo had paid petitioner a share of the profits from previous drug deals—$12,000 in February 1983 and another $10,000 in August of that year (GX 190).

2. The court of appeals reversed petitioner's drug conspiracy convictions but affirmed his RICO convictions (Pet. App. A1-A26). With regard to the drug conspiracy convictions, the court found (Pet. App. A16) that the evidence was insufficient. The court explained (*id.* at A10, A16) that petitioner's providing Cheo with the name of a pilot who could transport "a hypothetical load of marijuana" did not constitute an "agreement" to import marijuana, and that petitioner's "vague" discussions with Cheo concerning previous marijuana ventures "cannot be considered evidence upon which a conviction for conspiracy to possess marijuana may be upheld" (Pet. App. A10). The court therefore reversed petitioner's convictions on Counts Four and Five (*id.* at A16).

With regard to the RICO counts, the court found the evidence to be sufficient. The court noted (Pet. App. A20) that "the * * * conversation between Cheo and [petitioner] clearly demonstrates an agreement by [petitioner] to participate in the affairs of Cheo's enterprise." Although the court's reversal of petitioner's conviction for the two marijuana conspiracies eliminated those conspiracies (which were combined into a single predicate act of racketeering)

as support for the RICO convictions, the court found the proof sufficient to sustain the two remaining predicate acts charged in the indictment arising out of the plan to kidnap and then to murder Rogelio.[3] "[Petitioner] knowingly agreed to further the objective of the enterprise (narcotics smuggling) by agreeing to kidnap and murder an individual who had stolen from the enterprise and whose conduct, if allowed to go unpunished, would compromise the integrity and reputation of the enterprise" (*ibid.*).

The court rejected petitioner's argument that, since "the planned confinement of Rogelio merely would have been incidental to the murder," the conspiracies to kidnap and murder Rogelio constituted only one crime (Pet. App. A21). The court noted that under Florida law the proposed kidnapping of Rogelio would be a crime separate and distinct from his murder because it served separate purposes (*id.* at A21-A22):

> Both Cheo and [petitioner] agreed that abducting Rogelio and confining him at the farm would serve three purposes, which were independent of the act of killing Rogelio. The abduction and confinement would allow them to obtain information from Rogelio, would serve as an example to the community, and would lessen the detection of the murder.

Accordingly, the court concluded (Pet. App. A22), "the evidence demonstrates two predicate crimes chargeable

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[3] In Count One, which charged a conspiracy to violate the RICO statute, the predicate acts of racketeering that petitioner was alleged to have conspired to commit were the kidnapping of Rogelio, the murder of Rogelio, and the importation and possession of marijuana with the intent to distribute it. In Count Two, which charged a substantive violation of the RICO statute, the predicate acts of racketeering which petitioner was alleged to have committed were the conspiracy to kidnap Rogelio, the conspiracy to murder Rogelio, and the conspiracy to import and to possess marijuana with the intent to distribute it. Conspiracies to commit the offenses listed in 18 U.S.C. (Supp. III) 1961(1) are "acts involving" those offenses and therefore can serve as predicate

under Florida law, constituting the requisite pattern of racketeering activity."

The court also rejected petitioner's argument that, even if there were two separate crimes, the two predicate acts of racketeering did not constitute a "pattern of racketeering" within the meaning of the RICO statute, 18 U.S.C. 1961(5). The court of appeals noted this Court's suggestion in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), that "two isolated acts of racketeering activity do not constitute a pattern." The court of appeals concluded, however, that the two predicates charged in this case were not isolated acts at all, but plainly constituted a pattern of racketeering activity when viewed in the context of the much broader pattern of racketeering activity of which the proposed kidnapping and murder were a part. As the court observed, "[t]he conspiracies to kidnap and murder Rogelio were closely related * * * to the ongoing objective of narcotics smuggling" (Pet. App. A22 n.5).

ARGUMENT

1. Petitioner argues (Pet. 13) that the scheme to kidnap and then to kill Rogelio constituted only a single predicate act of racketeering. Petitioner, however, ignores the fact that the predicate acts of racketeering at issue here are separately defined by Florida state law. The RICO statute defines "racketeering activity" as including, inter alia, "any act or threat involving murder, kidnapping [or other listed crime] which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. (Supp. III) 1961(1). Thus, in determining whether one or two predicate acts were involved, the court of appeals properly looked to Florida law. And Florida law clearly indicates that, under the circumstances of this case, the kidnapping and murder of Rogelio would have constituted two distinct crimes. See Pet. App. A21-A22.

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acts in a substantive RICO count. See, *e.g.*, *United States* v. *Weisman*, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

For purposes of Count One, which charged a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, this analysis indicates that petitioner conspired to commit two separate predicate acts: the kidnapping of Rogelio and the murder of Rogelio. As we have noted, to prove a RICO conspiracy the government need only show that the defendant agreed to commit two predicate acts that constitute a pattern of racketeering activity. Since petitioner agreed both to kidnap Rogelio and to murder him, and since kidnapping and murder are separate crimes under Florida law, it follows that petitioner agreed to commit two predicate acts of racketeering.[4]

Even if the Court were to conclude that the kidnapping and murder of the same individual could not constitute two separate predicate acts of racketeering (and, hence, that an agreement to commit those two acts would not be sufficient to establish RICO conspiracy liability), the judgment below would still be correct. In our view, the court of appeals was wrong in finding that the evidence was insufficient to support the predicate act of racketeering that was based on the marijuana conspiracies charged in Counts Four and Five. Hence, on a proper analysis of the evidence, that additional predicate act would be available to support the judgment below. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)

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[4] With respect to Count Two, the substantive RICO violation, the issue is less clear. To prove a substantive RICO violation, one must show that the defendant actually committed two predicate acts of racketeering. As noted, conspiracies may serve as predicate acts in a substantive RICO conviction. But it is not clear whether conspiracy to kidnap and conspiracy to murder would, in the circumstances of this case, be chargeable as separate crimes under Florida law. The court of appeals did not address that question. In any event, this question of Florida law does not merit the Court's attention and, since petitioner's terms of imprisonment on Counts One and Two were made to run concurrently, the issue has little practical importance in this case.

(respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or the Court of Appeals"); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382-387 (6th ed. 1986).

The evidence presented by the government showed not just that petitioner was a member of Cheo's marijuana organization, but also that he was a trusted and valuable lieutenant who took part in the organization's drug distribution activities. During a single extended conversation, the two men discussed (1) Cheo's decision to switch his method of importation from the sea to the air; (2) a marijuana venture that had become "screwed up" and for which the organization owed money to "creditors"; (3) the necessity of kidnapping and killing Rogelio because he had stolen marijuana from them; and (4) the best way of hiding the fact that Cheo had exchanged his armored car for a shipment of marijuana.[5]

Petitioner's participation in the conspiracies to import and to possess marijuana with intent to distribute it constituted the only plausible explanation for his concern about the debt to the "creditors" of the "screwed up" drug deal; for his arranging to have the two brothers who had "screwed up" the transaction punished in jail; for his professed inability to sleep because of problems with Rogelio; or for his initiating the discussion about the need to punish Rogelio and his agreeing to kidnap and murder him. Indeed, if petitioner had said no more to Cheo than that

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[5] Although the court of appeals' opinion is unclear on the point, it appears that the court may have considered portions of the November 5, 1983, conversation between Cheo and petitioner to be hearsay. See Pet. App. A10-A11. In fact, the conversation was not hearsay at all. It consisted entirely of admissions and adoptive admissions by petitioner. Accordingly, none of the evidence that tied petitioner to the marijuana conspiracies was excludable as hearsay.

Cheo should not talk to him about money "until a trip comes in and I can get something"—an implicit reference to the fact that the government was successfully intercepting Cheo's marijuana shipments—petitioner's participation in Cheo's drug-trafficking operation would have been clear. In light of all this evidence—not to mention Cheo's two payments to petitioner totaling $22,000—the court of appeals clearly erred in refusing to consider the marijuana conspiracies as constituting a separate predicate act of racketeering against petitioner. Thus, even if petitioner were correct that the plan to kidnap and to murder Rogelio gave rise to only one predicate act of racketeering, his RICO conviction would still stand.

2. Relying on this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co., supra*, petitioner contends (Pet. 7-14) that, even if the Rogelio scheme counted as two predicate acts, the acts did not constitute a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5). In fact, however, there was substantial evidence in this case that established a pattern of racketeering of which the Rogelio scheme was a part. While in some cases, the commission of two predicate acts may not be sufficient to show a pattern of racketeering, there was ample proof in this case that the two predicate acts relating to Rogelio were not isolated criminal acts, but were part of a pattern of criminal activity designed to further the affairs of the narcotics enterprise charged in the indictment.

A pattern of racketeering activity, as defined in 18 U.S.C. 1961(5), requires at least two acts of racketeering activity committed during a single ten-year period. In *Sedima,* the Court observed (473 U.S. at 496 n.14) that while two acts of racketeering are necessary to establish a pattern under RICO, they "may not be sufficient." The Court explained that "two isolated acts of racketeering activity do not constitute a pattern;" rather, a pattern re-

quires " '*continuity plus relationship*' " (quoting S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis in original)). The Court went on to quote (473 U.S. 496 n.14) with approval the broad definition of "pattern" in the dangerous special offender statute, 18 U.S.C. 3575(e), as " 'embrac[ing] criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' "

Here, the court of appeals specifically found that petitioner's acts were not isolated acts of racketeering, but that they established a pattern by displaying the "continuity and relationship" referred to in *Sedima* (Pet. App. A22 n.5). The court explained (*ibid.*) that "[petitioner's] acts were not isolated. The conspiracies to kidnap and murder Rogelio were closely related * * * to the ongoing objectives of narcotics smuggling." As the court of appeals further observed, "[p]etitioner knowingly agreed to further the objective of the enterprise (narcotics smuggling) by agreeing to kidnap and murder an individual whose conduct, if allowed to go unpunished, would compromise the integrity and reputation of the enterprise" (Pet. App. A20). Contrary to petitioner's contention, therefore, the decision of the court of appeals is not inconsistent with this Court's decision in *Sedima* or any of the court of appeals cases following the *Sedima* case.[6]

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[6] If the court of appeals had considered the marijuana conspiracies as an additional predicate act against petitioner, as we submit it should have done, the pattern of racketeering activity established by the predicate acts would have been even clearer. The evidence at trial showed that the proposed kidnapping and murder of Rogelio were among petitioner's ongoing responsibilities in assisting the drug smuggling enterprise in which he was involved as a conspirator.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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